

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DOUGLAS AND JULIE
ALSOBROOK,

Plaintiffs,

vs.

AMERICAN HOME MORTGAGE et
al.,

Defendants.

CASE NO. 12-cv-2151-GPC-
WMC

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS'
FIRST AMENDED
COMPLAINT**

[DKT. NO. 30]

On August 19, 2013, Defendants Mortgage Electronic Registration Systems, Inc. (“MERS”) and Ocwen Loan Servicing LLC (“Ocwen”) filed this Motion to Dismiss Plaintiffs’ First Amended Complaint (“Motion to Dismiss”) pursuant to Federal Rule of Civil Procedure 41(b). (Dkt. No. 30.) On August 20, 2013, Defendant Saxon Mortgage, Inc. (“Saxon”) filed a notice joining that motion. (Dkt. No. 31.) For the reasons stated below, the Court **GRANTS** Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint.

I. BACKGROUND

On August 31, 2012, Plaintiffs Douglas and Julie Alsobrook brought this pro se action against MERS, Ocwen, and Saxon alleging wrongful foreclosure and fraud and seeking injunctive and declaratory relief to prevent the foreclosure of their property. (Dkt. No. 1.) On September 28, 2012, Saxon filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 7.) On October 5, 2012, MERS and Ocwen also filed a 12(b)(6) motion to dismiss. (Dkt. No. 8.) On February 12, 2012, this Court granted the Defendants' respective motions to dismiss without prejudice and granted Plaintiffs leave to file an amended complaint within fifteen days. (Dkt. No. 20.) On February 26, 2013, Plaintiffs filed a first amended complaint. (Dkt. No. 21, "FAC.") On March 15, 2013, MERS and Ocwen filed a 12(b)(6) motion to dismiss Plaintiffs' FAC. (Dkt. No. 22.) On March 27, 2013, Saxon filed a notice joining that motion. (Dkt. No. 24.) On May 30, 2013, this Court granted the Defendants' motion to dismiss without prejudice and granted Plaintiffs leave to file a second amended complaint within thirty days. (Dkt. No. 29.) Plaintiff did not file a third amended complaint.

17 On August 19, 2013, MERS and Ocwen filed this Motion to Dismiss. (Dkt. No.
18 30.) On August 20, 2013, Saxon joined that Motion to Dismiss. (Dkt. No. 31.) To
19 date, Plaintiffs have not filed a second amended complaint or an opposition to the
20 Motion to Dismiss.

II. LEGAL STANDARD

22 Federal Rule of Civil Procedure 41(b) permits a defendant to move for dismissal
23 of the action “if the plaintiff fails to prosecute or comply with” the Federal Rules or
24 court orders. Fed. R. Civ. P. 41(b). “Under [the] Ninth Circuit precedent, when a
25 plaintiff fails to amend his complaint after the district judge dismisses the complaint
26 with leave to amend, the dismissal is typically considered a dismissal for failing to
27 comply with a court order rather than for failing to prosecute the claim.” Yourish v.
28 California, 191 F.3d 983, 986 (9th Cir.1999). Accordingly, pursuant to Federal Rule

of Civil Procedure 41(b), the district court may dismiss an action for a Plaintiff's failure to comply with a court order to amend his complaint. Ferdik v. Bonzelet, 936 F.2d 1258, 1263 (9th Cir.1992). Unless the dismissal order states otherwise, a dismissal under Rule 41(b) operates as an adjudication on the merits, "except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19." Fed. R. Civ. P. 41(b).

"Dismissal is a harsh penalty and, therefore, it should only be imposed in extreme circumstances." Ferdik, 963 F.2d at 1260. Before dismissing an action, the Court must evaluate five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits. Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir.2002). Dismissal is proper "where at least four factors support dismissal, or where at least three factors strongly support dismissal." Dreith v. Nu Image, Inc., 648 F.3d 779, 788 (9th Cir.2011).

III. DISCUSSION

To determine whether to dismiss Plaintiffs' FAC, the Court evaluates the five factors.

A. Public's Interest in Expeditious Resolution of Litigation

"The public's interest in expeditious resolution of litigation always favors dismissal." Pagtalunan, 291 F.3d at 642. Here, the first factor favors dismissal. On August 31, 2012, Plaintiffs initiated this action. (Dkt. No. 1.) On February 13, 2013, this Court dismissed Plaintiffs' complaint but granted them fifteen days to file a first amended complaint. (Dkt. No. 20.) On February 26, 2013, Plaintiffs subsequently filed their FAC. (Dkt. No. 21.) On May 30, 2013, this Court dismissed Plaintiffs' FAC, but granted them thirty days to file a second amended complaint. (Dkt. No. 29.) Despite the May 30, 2013 Order, however, Plaintiffs, have failed to amend their FAC. (Id.) Furthermore, Plaintiffs did not provide

1 explanations for their failure to file a second amended complaint to this Court and
 2 did not file an opposition to Defendants' Motion to Dismiss. Due to these failures,
 3 this factor weighs strongly in favor of dismissal.

4 **B. Court's Need to Manage Its Docket**

5 "It is incumbent upon the Court to manage its docket without being subject to
 6 routine noncompliance of litigants." Pagtalunan, 291 F.3d at 642. Here, the second
 7 factor favors dismissal. Plaintiffs' failure to abide by the May 30, 2013 Order (Dkt.
 8 No. 29.) to file a second amended complaint has caused this action to stall,
 9 impermissibly allowing Plaintiffs to control the pace of the docket, rather than the
 10 Court. Plaintiffs' conduct show that they do not intend to litigate this action diligently.
 11 Dismissal of this action would, therefore, resolve this litigation and assist in the
 12 effective management of the Court's docket. Thus, this factor also weighs in favor of
 13 dismissal.

14 **C. Risk of Prejudice to Defendants**

15 A presumption of prejudice arises from a plaintiff's unexplained failure to
 16 prosecute. Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir.2002).
 17 "Unnecessary delay inherently increases the risk that witnesses' memories will fade and
 18 evidence will become stale." Pagtalunan, 291 F.3d at 643. "[W]here a plaintiff has
 19 come forth with an excuse for his delay that is anything but frivolous, the burden of
 20 production shifts to the defendant to show at least some actual prejudice." Nealey v.
 21 Transportacion Maritima Mexicana, S.A., 662 F.2d 1275, 1281 (9th Cir.1980).

22 To date, Plaintiffs have not come forth with any reason or explanation for
 23 their failure to comply with this Court's Order or respond to the pending motion to
 24 dismiss. Accordingly, their inaction creates a presumption of prejudice. Thus, this
 25 factor weighs in favor of dismissal.

26 **D. Availability of Less Drastic Alternatives**

27 The court need not exhaust every sanction short of dismissal before finally
 28 dismissing a case, but must explore possible and meaningful alternatives. Henderson

v. Duncan, 779 F.2d 1421, 1424 (9th Cir.1986). In the Ninth Circuit, when a case is not quite a year old, a district court must consider less drastic alternative sanctions before dismissing the case. See Raiford v. Pounds, 640 F.2d 944, 945 (9th Cir.1981).

4 Here, the Court provided Plaintiffs two opportunities to amend their complaints
5 and cure the complaints' deficiencies. (Dkt. Nos. 20 & 29.) Although the Court could
6 grant Plaintiffs additional time to file a second amended complaint, Plaintiffs have not
7 sought an extension of time show they desire to continue with this action or are able
8 to cure the deficiencies of the FAC. Accordingly, no meaningful alternatives are
9 available at this stage of litigation.

E. Public Policy Favoring Disposition of Cases on Their Merits

11 “The public policy favoring disposition of cases on their merits counsels strongly
12 against dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998).
13 Here, the case would not be decided on the merits. Given that public policy favors
14 disposition of cases on the merits, this factor does not weigh in favor of dismissal.
15 Pagtalunan, 291 F.3d at 643.

16 On balance, the Court concludes that four of the five factors weigh in favor of
17 dismissal. As a result of Plaintiffs' failure to amend their FAC after the May 30, 2012
18 Order, (Dkt. No. 29), and to provide explanations for the delay, the Court finds that
19 dismissal of the action is warranted.

IV. CONCLUSION

21 For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**.
22 The Court hereby **DISMISSES** the action in its entirety **WITHOUT PREJUDICE**.

23 The Clerk of Court shall enter judgment accordingly.

24 || DATED: September 30, 2013

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HON. GONZALO P. CURIEL

United States District Judge